Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1533

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioner,

v.

COMMUNITY OIL COMPANY, INC.
JOSEPH E. SEAGRAMS & SONS, INC.
KODAY PRESS CO., INC.
UPACO ADHESIVES, INC.
EATON CORPORATION
MILLER, JENNINGS & KEARNEY
DAVID MICHAEL & CO., INC.
SEA LAND SERVICES, INC.
ZIGER, RESNICH AND FEDDER
PETER L. CHAKMAKIAN
GEORGE C. HESTER
JULIUS SANKIN
JEROME J. PARKS
CHRISTINE R. GAINER
EVELYN R. RUEHL
VINCENT V. CHANEY, SPECIAL RECEIVER, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

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June 6, 1975

Stryker-Post Publications, Inc. Washington, D.C.

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IN THE

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October Term, 1974
No. _____

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,
Petitioner,

v.

COMMUNITY OIL COMPANY, INC., et. al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

The Petitioner, St. Paul Fire and Marine Insurance Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Circuit Court of Jefferson County, West Virginia entered on the 24th and 26th days of June, 1974 review of which were refused by the Supreme Court of Appeals of West Virginia upon two petitions for appeal and supersedeas.

OPINION BELOW

The orders of judgment of June 24, 1974 and June 26, 1974 appear in the appendix hereto. No opinion was rendered by the Supreme Court of Appeals of West Virginia in refusing two petitions for appeal and supersedeas.

JURISDICTION

The judgment of the Circuit Court of Jefferson County is contained in orders entered on the 24th and 26th day of June, 1974. Timely

petition for appeal was presented to the Supreme Court of Appeals of West Virginia (West Virginia Code, Chapter 58, Article 5, Section 4) on February 18, 1975, which petition was refused on February 26, 1975; a second petition was presented on February 26, 1975 which was refused on March 10, 1975. Discretionary review having been refused, the decision and judgment of the Circuit Court of Jefferson County is that of the highest court in which decision could be had (*Minneapolis, St. P. & S.S.M.R. Co. v. Rock, 279 U.S. 410; Virginian R. Co. v. Mullens,* 271 U.S. 220). This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the claim of a surety on a bond under which it has paid money to the U.S. government, asserted in a state receivership proceeding under Title 31 U.S.C. §191 and §193, can be defeated through improper construction of state statutes and improper evidentiary rulings favoring general creditors notwithstanding the priority of such a surety under Title 31 §§191, 193.

2. Whether the claim of a surety on a bond on which it has paid money to the U.S. government can be impaired and superseded by the judgment of a state court to the effect that the claim, presented under Title 31 U.S.C. §§191,193, "has not been proved."

3. Whether a state court can impair and supersede the priority of the U.S. government or a surety who has paid money to the U.S. government, asserted under 31 U.S.C. §§191,193, by refusing proof of the surety's claim while at the same time allowing general, unsecured creditors an opportunity to assert and prove their claims and then enter judgment in favor of such general, unsecured creditors.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 31:

§ *191. Priority established*

Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all

his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. R.S. 23466.

§ 193 *Priority of sureties*

Whenever the principal in any bond given to the United States is insolvent, or whenever, such principal being deceased, his estate and effects which come to the hands of his executor, administrator, or assignee, are insufficient for the payment of his debts, and, in either of such cases, any surety on the bond, or the executor, administrator, or assignee of such surety pays to the United States the money due upon such bond, such surety, his executor, administrator, or assignee, shall have the like priority for the recovery and receipt of the moneys out of the estate and effects of such insolvent or deceased principal as is secured to the United States; and may bring and maintain a suit in law or equity, in his own name, for the recovery of all moneys paid thereon. R.S. § 3468.

STATEMENT OF THE CASE

John Brown Distilling Company, Inc. was incorporated in 1963 with principal offices at Harpers Ferry, West Virginia to process, bottle and sell alcoholic beverages. Its principal officers, both members of the bar of West Virginia, were Peter L. Chakmakian, Chairman of the Board of Directors, Treasurer and Secretary, and Jerome Radosh, President. For purposes of importing alcoholic beverages under bond, John Brown Distilling Company, Inc. executed a power of attorney to Samuel Shapiro & Co., a licensed Custom House broker in Baltimore, signed by Jerome Radosh, President and Peter L. Chakmakian, Secretary. A second corporation, wholly owned by John Brown Distilling Company, Inc., called Madison Avenue Imports, Ltd., a New York corporation with its principal place of business in Harpers Ferry, West Virginia, also executed a power of attorney to the same broker, signed by Peter L. Chakmakian, President, and Jerome Radosh, Secretary.

A petition to appoint a receiver of John Brown Distilling Com-

pany, Inc. was filedin the Circuit Court of Jefferson County, West Virginia by Jerome Radosh on September 18, 1972 which was answered on September 19, 1972 by Peter L. Chakmakian, who admitted all allegations in the petition and joined in the prayer for appointment of a receiver. The grounds for this action were that John Brown Distilling Company, Inc. had ceased operations and was under attack by numerous creditors.

Proceedings before a court-appointed Receiver ensued; in his report to the Court there were established nine priorities of secured creditors with ascertainable liens of record at the time the receiver was appointed, and a number of general creditors to whom the tenth priority was assigned. Among the general creditors whose claims were approved by the Commissioner was Koday Press, Inc. on unpaid invoices for bottle labels addressed to John Brown Distilling Company, Inc. for "Madison Avenue Imports" labels. Peter L. Chakmakian, who claimed to be a general creditor of John Brown Distilling Company, Inc., objected to the report of the Commissioner on the grounds, *inter alia*, that "The report fails to list all of the liabilities which would enjoy a priority of preference. a. Excise tax and customs duty tax payable to the United States Bureau of Customs. $13,087.12 . . ." No objection was made to the payment of Koday Press, Inc. for Madison Avenue Imports bottle labels.

Petitioner St. Paul Fire and Marine Insurance Company moved on August 21, 1973 for leave to intervene in the receivership proceeding. In support of its motion, it alleged it had paid the sum of $14,457.25 to the United States on a surety bond upon which John Brown Distilling Company, Inc. was the principal obligor of customs duties and import taxes. S.L. Minghini and B.B. Minghini, Partners, doing business as S.L. Minghini and Son, Sea-Land Service, Inc., and Community Oil Company, Inc., general creditors of John Brown Distilling Company, Inc. opposed the motion, which was granted; the Court (Sencindiver, J.) referred the claim to its Commissioner, Henry W. Morrow. In its complaint which accompanied the Motion to Intervene, St. Paul Fire and Marine Insurance Company alleged that under the applicable laws of the United States it, as a subrogee under a claim for unpaid customs duties and taxes due the United States, was entitled to preference over each and every other creditor in the receivership proceeding *(Record, pp.140-141)*. The federal question sought to be reviewed by this Court was thus initially raised in the trial court.

St. Paul Fire and Marine Insurance Company submitted proof of its claim in the form of an affidavit accompanied by exhibits to which reference was made in the affidavit. A memorandum in support of the

priority granted by 31 U.S.C. §§ 191, 193 was submitted with the affidavit *(Record, pp. 276-281)*. Community Oil Company, Inc. responded with an affidavit purporting to deny that St. Paul Fire and Marine Insurance Company "made a payment to the United States Bureau of Customs in the amount of $14,457.25 for and on behalf of John Brown Distilling Company, Inc., by virtue of any obligation of John Brown Distilling Company, Inc., to the United States Bureau of Customs. . ."

Discovery procedures undertaken by St. Paul Fire and Marine Insurance Company (West Virginia procedure is almost identical to the Federal Rules of Civil Procedure) revealed that the denial was without substance and that the person signing the affidavit was "without knowledge or information sufficient to form a belief" regarding the claim of St. Paul Fire and Marine Insurance Company. There was also a "demand" that St. Paul Fire and Marine Insurance Company prove its claim, followed by a general denial of the claim and a second demand requiring "strict proof thereof."

In hearings before the Commissioner, St. Paul Fire and Marine Insurance Company offered its affidavit and exhibits, having the same marked by the Commissioner, and submitted additional documents. The original check from St. Paul Fire and Marine Insurance Company payable to the Bureau of Customs was exhibited to the Commissioner and a copy thereof was marked and included in the record. The other documents included the bonded warehouse entry document and the surety agreement under which St. Paul Fire and Marine Insurance Company guaranteed payment of customs duties on 88 barrels of scotch whiskey consigned to John Brown Distilling Company, Inc. The Commissioner ruled that the purported denial of the claim by Community Oil Company, Inc. was a valid denial of the claim of St. Paul Fire and Marine Insurance Company. The law involved in the ruling of the commissioner,Chapter 56, Article 7, Section 6 of the West Virginia Code, provides, *inter alia:*

> "Every creditor in any chancery cause pending in any court before a commissioner in chancery under a decree of reference in such cause may establish his debt or demand against the debtor, if it be for the recovery of money due on contract, by filing before the commissioner with such debt or demand, completely itemized where it is upon an account, the affidavit or affidavits of any person or persons competant and not disqualified by law (which competency the affidavit or affidavits shall affirmatively show in every case where the creditor is seeking to prove a debt or demand against a deceased debtor or his estate) to testify

as a witness or as witnesses before the commissioner about or concerning the debt or demand in question, such affidavit or affidavits stating every essential element necessary to constitute proof of such debt or demand, the same as though affiant or affiants had testified before the commissioner as a witness or as witnesses in person, *unless the debtor, his personal representative, or any party or creditor, or other person interested, shall file before the commissioner a counter affidavit denying the correctness of the debt or demand, as a whole or in part, or the validity of any lien* by which it is secured, in which case the creditor presenting such debt or demand shall be required to produce his witness or witnesses before the commissioner, reasonable notice of which shall be given in writing to the creditor or his attorney, and the taking of the testimony relative to such debt or demand, or the validity of such lien, as the case may be, shall be proceeded with before the commissioner in like manner as if no affidavit or affidavits had been filed."

(Emphasis supplied)

When St. Paul Fire and Marine Insurance Company insisted that the counter affidavit was spurious and rested before the Commissioner, Community Oil Company, Inc. called Peter L. Chakmakian over the objection of St. Paul Fire and Marine Insurance Company on the ground of surprise, since he had filed no objection or counter affidavit to the claim of the surety. He testified a flat denial that "John Brown Distilling Company, Inc. owes any money whatsoever to St. Paul Fire and Marine Insurance Company by reason of St. Paul Fire and Marine Insurance Company paying to the United States Bureau of Customs the sum of . . . $14,457.25 on December 16, 1971." Upon further examination the Treasurer of John Brown Distilling Company, Inc. and President of Madison Avenue Imports, Ltd. stated that Madison Avenue was billed by the Bureau of Customs on a warehouse entry, for $14,457.25, that it did not pay the bill and that St. Paul Fire and Marine Insurance Company did pay the bill, maintaining that "it was not John Brown's obligation."

Further cross examination established that prior to 1967 John Brown Distilling Company, Inc. imported scotch whiskey, but after its wholly-owned subsidiary, Madison Avenue Imports, Ltd., was formed, John Brown Distilling Company, Inc. imported scotch only through its subsidiary and others, and not in its own name. With

respect to the 88 barrels of scotch whiskey for the import of which St. Paul Fire and Marine Insurance Company paid the Bureau of Customs, "it all came to John Brown Distilling Company" and that "it was treated, packaged and bottled and shipped to various customers. And, hopefully, consumed." The Commissioner ruled that the claim of St. Paul Fire and Marine Insurance Company "has not been proved," which ruling was accepted over objection of St. Paul Fire and Marine Insurance Company, by the Circuit Court of Jefferson County as its ruling.

St. Paul Fire and Marine Insurance Company then filed a Motion for Relief from Judgment requesting that its claim be recommitted to the Commissioner for further proof, accompanied by a copy of an affidavit interlineated, but not signed, by Jerome Radosh indicating that at the time of the subject transaction, John Brown Distilling Company, Inc. was the guarantor of the obligations of Madison Avenue Imports, Ltd. The trial court refused to recommit the claim of St. Paul Fire and Marine Insurance Company on the ground that "the case has already progressed too slowly and should not further be delayed." It emphasized the proposition that the debt was that of Madison Avenue Imports, Ltd. and not that of John Brown Distilling Company, Inc. although the report of the commissioner indicated only that St. Paul Fire and Marine Insurance Company "had not proved its claim. The Court also indicated that it "is somewhat troubled about the relationship of the two aforesaid corporations, relationship of some of the attorneys and officers of these corporations . . ." At the same time, the court recommitted the matter to the Commissioner to give general creditors who had not proved their claims the first time around another opportunity. Among those granted this opportunity was Peter L. Chakmakian, who claimed he was owed $ 21,650.00.

The proceedings before the Commissioner took another five months, after which the court entered a final order of distribution of the remaining assets of John Brown Distilling Company, Inc.. The distribution would exhaust the funds in the hands of the Receiver, so distribution on a pro-rata basis was ordered. Among those claims allowed in the third committal to the Commissioner was that of Peter L. Chakmakian in the amount of $21,650.00 The court ordered a stay of distribution to enable St. Paul Fire and Marine Insurance Company to appeal to the Supreme Court of Appeals of West Virginia, conditioning its stay upon payment to the Receiver of $957.09 costs by St. Paul Fire and Marine Insurance Company.

A petition for appeal to the state appeals court was denied on February 26, 1975 and a second petition was denied on March 10,

1975. The Receiver continues to hold funds allocated to general creditors lest he be held liable under 31 U.S.C. § 192 in the event that this Court grants certiorari and directs payment of the claim of St. Paul Fire and Marine Insurance Company.

REASONS FOR GRANTING THE WRIT

1. THE COURT BELOW DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE DECISIONS OF THIS COURT AS TO THE PROPER INTERPRETATION OF 31 U.S.C. §§ 191, 193.

This Court has on numerous occasions construed the meaning of Section 191, Title 31 of the United States Code. It has stated the purpose of the section is "to secure an adequate revenue to sustain the public burden" *United States v. State Bank of North Carolina*, 6 Pet. 29, 35. Its language, granting the United States priority over all unsecured creditors as to the estate of an insolvent, is "to be liberally construed to effectuate that purpose." *U.S. v. Emory*, 314 U.S. 423,

.

Section 193 grants the priority of the U.S. to a surety who has paid money to the United States *(see Hunter v. U.S.*, 5 Pet. 173, 182). This also is toward the purpose expressed in *U.S. v. State Bank of North Carolina, supra*, inasmuch as the United States has a continuing interest in the availability of solvent sureties willing to hold harmless the federal government against problems in collecting obligations owing to it, and against the insolvency of principal debtors. St. Paul Fire and Marine Insurance Company asserted the right of the United States in the trial court and before the Supreme Court of West Virginia which right was wrongfully defeated.

The propriety of asserting such a right arising under federal law in a state forum is clear. See, e.g. *U.S. v. Knott*, 298 U.S. 544, 552. This Court has held that a denial of that right by the state court is reviewable by certiorari, and that this Court has the jurisdiction and power to review the correctness of such a denial in *Illinois v. Campbell*, 329 U.S. 362, 363, 366. In that case the Court further stated at page 371

> "The effect and operation of a lien in relation to the claim of priority by the United States under Rev. Stat. § 3466 is always a federal question. 'The priority given the United States cannot be impaired or superseded by state law.' *United States v. Oklahoma*, 261 U.S. 253, 260. Hence a state court's characterization of a lien as specific and perfected is not conclusive. *United States v. Waddill Co.*, 323 U.S. 353, 357. The state characterization, though entitled to weight, is always subject to reexamination by this Court."

A judgment of a court denying a debt due the United States prejudices its right of priority *(U.S. v. Knott*, 298 U.S. 544, 551). In the cases of *United States v. Oklahoma*, 261 U.S. 253, 260 and *Spokane County v. United States*, 279 U.S. 80, 93 this Court held that the priority under 31 U.S.C. 2 191 "attaches upon the appointment of the receiver." After it attaches it is indefeasible according to the language of *Commonwealth of Massachusetts v. United States*, 335 U.S. 611:

> "The only such consistent application would seem to be one giving the government the prior and indefeasible right to take the fund available, up to the amount necessary to pay its claim as of the date the priority attaches, not as it may be affected by later contingencies other than payment. In enacting § 3466 Congress gave no indication whatever of intent to create defeasible priorities."

The decision of the lower court to the effect that St. Paul Fire and Marine Insurance Company "had not proved its claim" constituted a denial of its right under federal law. If its priority could not be "impaired or superseded by state law," it is clear that the same priority could not be defeated by state *procedure*.

2. THE DENIAL OF PETITIONERS FEDERAL RIGHT BY THE STATE COURT WAS THE PRODUCT OF A COMPLETE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The provisions of Chapter 56, Article 7, Section 6 of the West Virginia Code set forth in the Statement of the Case, *supra*, obviously had the purpose of providing an efficient, inexpensive means for proof of claims before a Commissioner in a receivership proceeding by the filing of an affidavit or affidavits with exhibits. The same

statute contains provisions allowing a contest over a debt or claim by the filing of a counter affidavit. The statute does not contemplate that one creditor may increase the expense of another in proving his claim by filing a spurious denial; if such were the case, the entire intent of this section of the code would be routinely defeated.

St. Paul Fire and Marine Insurance Company established before the commissioner that the denial of its claim by Community Oil Company, Inc. was in fact spurious since it was based on a supposed lack of knowledge and information of the affiant with respect to the claim of St. Paul Fire and Marine Insurance Company. A lack of knowledge of the claim of another is not a denial of its correctness. Nevertheless, the report of the Commissioner to the effect that the claim of St. Paul Fire and Marine Insurance Company "has not been proved" was solely predicated on the spurious counter affidavit of Community Oil:

> "The Commissioner is of the opinion, and so reports to the Court, that the affidavit of Barbara J. Heil, Claims Manager for St. Paul Fire and Marine Insurance Company, and the exhibits heretofore mentioned filed before the Commissioner by St. Paul (sic) are insufficient to establish the debt and demand of St. Paul (sic) *where a counter affidavit has been filed by another party in interest, as was done in this case.*"
>
> *(emphasis supplied)*

Presumably, absent the purported counter affidavit, the Commissioner would have reported that the claim and demand of St. Paul Fire and Marine Insurance Company had been proved. Following this report, the trial court's refusal to recommit the claim of St. Paul Fire and Marine Insurance Company to the Commissioner on the ground that "the case has already progressed too slowly and should not further be delayed" was clearly the imposition of a "later contingency" to "impair and supercede" the priority of St. Paul Fire and Marine Insurance Company. When at the same time the Court recommitted the proceeding to the Commissioner to allow *general* creditors, including Peter L. Chakmakian, a *second* opportunity to prove their claims, it is clear that it departed from the accepted and usual course of judicial proceedings through partiality to general creditors over the priority claim of St. Paul Fire and Marine Insurance Company.

3. THE JUDGMENT OF THE LOWER COURT IN DEFEATING PETITIONER'S RIGHT SECURED BY FEDERAL LAW IS PLAINLY WRONG.

Even if the testimony of Peter L. Chakmakian, given before the Commissioner in opposition to the claim of St. Paul Fire and Marine Insurance Company, is considered in its totality together with the record of the entire proceeding, the judgment of the lower court denying petitioners claim and authorizing payment of the balance of funds by the receiver to general creditors was plainly wrong. The witness, Chairman of the Board of Directors of John Brown Distilling Company, Inc. and President of Madison Avenue Imports, Ltd., testified to the effect that the claim of St. Paul Fire and Marine Insurance Company was a debt of Madison Avenue Imports, Ltd. and not that of John Brown Distilling Company, Inc. This contention cannot be sustained for the following reasons:

1. Peter L. Chakmakian had objected and excepted to a prior report of the Commissioner on the ground that it did not reflect a debt due the Bureau of Customs in excess of $13,000. by John Brown Distilling Company, Inc. (not Madison Avenue Imports, Ltd.), further stating that such a claim had priority.

2. Peter L. Chakmakian made no objection to the portion of the first Commissioner's report allowing payment by the receiver of John Brown Distilling Company, Inc. for scotch whiskey labels bearing the imprint *Madison Avenue Imports, Ltd.*

3. Madison Avenue Imports, Ltd. was a wholly-owned subsidiary corporation of John Brown Distilling Company, Inc. through which the latter imported the 88 barrels of scotch whiskey subject to customs duties paid by St. Paul Fire and Marine Insuance Company as surety.

4. The scotch whiskey subject to customs duties and taxes paid by St. Paul Fire and Marine Insurance Company *actually went* to John Brown Distilling Company, Inc. which in turn processed it, bottled it and sold it to its customers, who "hopefully" consumed it.

It is apparent from the record that the lower court was aware of the above by virtue of its statement to the effect that it was "somewhat troubled about the relationship of the two aforesaid corporations, relationship of some of the attorneys and officers of these corporations." The intent of 31 U.S.C. §§ 191, 193 is not satisfied by a judgment of a court granting priority to general creditors over the United States or sureties which have paid money to the United States. This result in the lower court in the case at bar is plainly wrong and resulted in an injustice which should be corrected by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Circuit Court of Jefferson County, West Virginia.

Respectfully submitted,

PIERRE E. DOSTERT
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Counsel for Petitioner.

June 6, 1975.

Certificate of Service

I hereby certify that on this 5th day of June, 1968, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the following attorneys, organizations and persons:

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I further certify that all parties required to be served have been served.

/s/ Pierre E. Dostert
Pierre E. Dostert
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Counsel for Petitioner.

APPENDIX

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WEST VIRGINIA

THE LEVON CORPORATION, a corporation,

Plaintiff,

vs.

Civil Action No. 2025

JOHN BROWN DISTILLING COMPANY, INC., a corporation, et. als.,

Defendants.

ORDER

THIS 24th day of June, 1974, came S.L. Minghini and B.B. Minghini, Partners, doing business as S.L. Minghini and Son, Howard S. Koonce and Henrietta L. Koonce, Sea-Land Service, Inc. and Community Oil Company, Inc., by F. Dean Nichols, their attorney; John Brown Distilling Company, Inc. and Peter L. Chakmakian, by Peter L. Chakmakian, their attorney; Peoples Bank of Charles Town, Anchor Hocking Corporation, Thatcher Plastic Packaging Co. and Lee Bushong, Trustee, by Lee Bushong, their attorney; Smith-Nadenbousch Insurance, Inc., by Thomas W. Steptoe, its attorney; Sheriff of Jefferson County by Robert R. Skinner, his attorney; Henry W. Morrow, Commissioner, and W.H.S. White, Jr., Receiver, and St. Paul Fire and Marine Insurance Company, by Pierre E. Dostert, its attorney, and, The Levon Corporation made no appearance.

. . .(Immaterial portions of order omitted.)

Upon the motion of S.L. Minghini and Son, et. als., that the Court overrule the exception of St. Paul Fire and Marine Insurance Company, came Pierre E. Dostert, attorney for St. Paul Fire and Marine Insurance Company, in support of its exception to the Report of the Commissioner insofar as the Commissioner disallowed the claim of St. Paul Fire and Marine Insurance Company against John Brown Distilling Company, Inc., upon Report of the Commissioner, exhibits and evidence taken and returned to the Court, and, upon

argument of counsel, the Court, upon consideration, doth overrule the exception of St. Paul Fire and Marine Insurance Company hereinbefore filed with the Commissioner and doth further ORDER that the Report of the Commissioner dated May 30, 1974, is hereby sustained, insofar as the Commissioner finds that the claim of St. Paul Fire and Marine Insurance Company against John Brown Distilling Company, Inc. has not been proved, to which action of the Court, St. Paul Fire and Marine Insurance Company objects and excepts and excepts.

Upon the motion of S.L. Minghini and Sons, et. als., that all the costs of the recommitment to Henry W. Morrow, Commissioner, be assessed against St. Paul Fire and Marine Insurance Company, pursuant to the Order of this Court dated September 18, 1973, IT IS FURTHER ORDERED that the fees and expenses of the Commissioner in and about his Report dated May 30, 1974, in the amount of $855.44, and the expenses of taking and transcribing the evidence before him by Business Services-East in the amount of $101.65 be forthwith paid by St. Paul Fire and Marine Insurance Company to W.H.S. White, Jr., Receiver, to reimburse the Receiver for costs hereinbefore ordered by the Court to be paid from the funds in the hands of the Receiver, to which action of the Court, St. Paul Fire and Marine Insurance Company objects and excepts.

. . . *(Immaterial portion omitted.)*

Upon the motion of S.L. Minghini and Sons, et. als., that the priorities of the creditors of John Brown Distilling Company, Inc. be established, and, it appearing to the Court that the claims of the first NINE priority lien creditors have been established and the Receiver ordered to pay the same under this Order, and that the cliam of St. Paul Fire and Marine Insurance Company, who has claimed a tenth priority of all the general creditors set forther in the Report of the Commissioner dated April 2, 1973, under TENTH PRIORITY (b) through (i) has heretofore been denied, and, it further appearing to the Court that the general creditors under the "TENTH PRIORITY" (b) through (i) have previously established their claims as creditors for the amounts set forth therein before the Commissioner without objection, IT IS ORDERED that the claims of said general creditors (b) through (i) for the amounts set forther therein be, and the same are hereby confirmed over the objection of St. Paul Fire and Marine Insurance Company and the Court overrules the said objection which is excepted to by St. Paul Fire and Marine Insurance Company.

The Court, on its own motion, pursuant to the Court's Order dated May 29, 1973, Page 4 thereof, after noting that no hearing had been held and no Report has been made by the Commissioner dealing with

the imperfected claims of creditors under the Report of the Commissioner dated April 2, 1973, on Page 5 thereof, beginning with the words: "The following creditors presented claims, but the claims are not in the form prescribed by law." and continuing "(a) Linden J. Bush dba Valley Hardware Company . . . (through) (m) Vincent Chaney, Special Receiver", IT IS ORDERED that the Report of the Commissioner, insofar as said claims are concerned be recommitted to Henry W. Morrow, Commissioner, to permit the following creditors who timely refiled to establish their claims and priorities:

1. Ziger, Reznich and Fedder
2. Peter L. Chakmakian
3. George C. Hester
3. Julius Sankin
5. Jerome J. Parks
6. Christine R. Gainer
7. Evelyn Ruehl
8. Vincent Chaney, Receiver

Provided, however, the claims of said creditors shall in no way change the priorities of creditors set forth under TENTH PRIORITY (b) through (i) - (a) having been previously disposed without objection by any party hereto.

To which ruling of the Court in not making distribution to the general creditors under TENTH PRIORITY (b) through (i), Community Oil Company, Inc. and Sea-Land Service, Inc. object and except, and to which Peter L. Chakmakian objects and excepts on the ground that the Court established a priority distribution to creditors under TENTH PRIORITY (b) through (i).

Pierre E. Dostert, attorney for St. Paul Fire and Marine Insurance Company, moved the Court to reopen and recommit the claim of St. Paul Fire and Marine Insurance Company to the Commissioner for further proof and further moved the Court for a continuance in order to file an affidavit of Jerome Radosh in support of the motion to recommit, whereupon the Court continued said motion until Wednesday, June 26, 1974, at 11:00 o'clock a.m., or as soon thereafter as said motion may be heard.

The Clerk will enter the foregoing as of the date first above written.

/s/Gray Silver, Jr.

JUDGE OF THE CIRCUIT COURT OF
JEFFERSON COUNTY, WEST VIRGINIA

(Caption)

ORDER

THIS 26th day of June, 1974 came Pierre E. Dostert, attorney for St. Paul Fire and Marine Insurance Company, Peter L. Chakmakian, in person and as attorney for John Brown Distilling Company, Inc. and F. Jean Nichols, attorney for Community Oil Company and Sea Land Services, Inc.

Upon the motion of St. Paul Fire and Marine Insurance Company to grant relief from the Order of this Court dated June 24, 1974 and to reopen and recommit the claim of said creditor to Henry W. Morrow, Commissioner for further proof of its claim as provided for under the last paragraph of the Order of this Court dated June 24, 1974.

Whereupon counsel for St. Paul Fire and Marine Insurance Company tendered to the Court and asked leave to file a document "Motion for Relief from Judgment and Order and Motion for a new trial" to which is attached a sheet entitled "Points and Authorities," "Affidavit of Pierre E. Dostert" duly executed and a three page paper entitled "Affidavit of Jerome Radosh" bearing certain interlineations in ink and a purported facsimile signature unsworn to together with the original "Affidavit of Jerome Radosh" which contained no interlineations and was both unsigned and unsworn to; all of which are hereby ORDERED filed.

The Court thereupon proceeded to a hearing on the said motion for relief from said Order which consisted of a study of the commissioner's report dated May 30, 1974, the exhibits and transcript of the testimony and the arguments of counsel for and against the granting of said motion.

And it appearing to the Court from W. Va. Code 56-7-1 unnumbered paragraph three (3) thereof that the report of the commissioner dated May 30, 1974 should not be recommitted to the Commissioner except for good cause shown and that from the record and the transcript made up before the Commissioner that the Bureau of Customs treated Madison Avenue Imports, Ltd. as the importer creating an obligation on Madison Avenue Imports, Ltd. to pay the U.S. import duty and taxes even though they may in turn ship it to

John Brown Distilling Company for processing such as cutting, bottling, labeling and packing on a service charge per case basis, and that the payment of the duty and taxes was the obligation of Madison Avenue Imports, Ltd., and it was its failure so to do that created obligation of the surety company, St. Paul Fire and Marine Insurance Co., to pay, if in fact it did make payment as surety.

There is no clear showing in the evidence that the obligations of Madison Avenue Imports, Ltd., a New York Corporation, not qualified to do business in the state of West Virginia are the obligations of John Brown Distilling Company, Inc., a West Virginia Corporation and should be treated as such to the disadvantage of the established claims of other creditors.

The Court is somewhat troubled about the relationship of the two aforesaid corporations, relationship of some of the attorneys and the officers of these corporations but finds no error in the report of the commissioner in respect to the claim of St. Paul Fire and Marine Insurance Company and must consider the motion as a motion for a new trial made in an appellate Court to reopen a case for further proof where there was no such motion made in the "trial court".

The motion would hardly come within the rule for new trials on the ground of newly discovered evidence (13 M.J. 636 et. seq.-New Trials, Sec. 22) in that it does not meet the five requirements on this ground, the Court noting that excluding the affidavit of Pierre Dostert, the only other affidavit is neither signed nor sworn to.

It further appearing to the Court that the case has already progressed too slowly and should not further be delayed.

It is ADJUDGED, ORDERED AND DECREED that the motion for a Recommital to the Commissioner entitled "Motion for Relief from Judgment and Order and Motion for New Trial" heretobefore filed by St. Paul Fire and Marine Insurance Company be denied to which action of the Court St. Paul Fire and Marine Insurance Company objects and excepts.

And counsel for St. Paul Fire and Marine Insurance Company having announced his intention to seek a removal of this proceeding in this Court designated as Civil Action 2025 from this Court to the United States District Court for the Northern District of West Virginia and that it would need ten (10) days therefor, it is further ADJUDGED AND ORDERED that all further proceedings herein be stayed for a period of thirty (30) days from June 26, 1974 to allow it to take such action if it be so advised, except that the disbursements by the Receiver as hereinbefore ordered by the Court under Order dated June 24, 1974 of the first nine (9) priority lienholders and of the costs, this proceeding to which there was no objection by any party, shall

not be stayed and the Receiver shall make such disbursements and report to the Court as to what the Receiver has done under order of this Court dated June 24, 1974, to which action of the Court in staying said proceedings, counsel for Community Oil Company and Sea Land Services, Inc., object and except.

The Clerk will enter the foregoing as of the date first above written.

/s/*Gray Silver, Jr.*
Judge